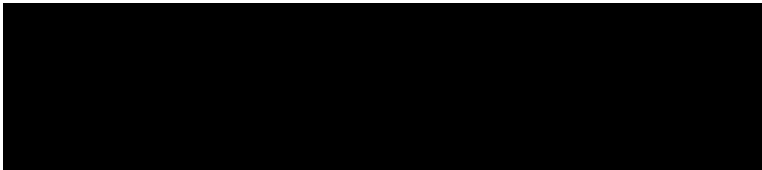




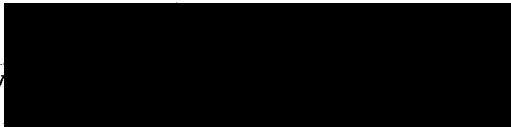
U.S. Citizenship
and Immigration
Services

BY



FILE: WAC 03 171 50696 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary



AUG 23 2004

PETITION: Petition for Alien Worker as an Unskilled, Other worker Pursuant to Section 203(b)(3)(A)(iii)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a pizza restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The petitioner seeks to classify the beneficiary as an unskilled, other worker pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). This category provides immigrant visas for qualified aliens who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered from the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 20, 2001. The beneficiary's salary as stated on the labor certification is \$8.14 per hour or \$16,931.20 per year.

The petitioning corporation is not represented by counsel and submitted insufficient evidence of its ability to pay the proffered wage with the Immigrant Petition for Alien Worker (Form I-140). In a request for evidence (RFE) dated April 5, 2004, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's 2001-2003 federal income tax returns, with all schedules, attachments, and appropriate signatures, or its audited financial statement, as well as 2001-2003 Wage and Tax Statements (Forms W-2) as evidence of wage payments to the beneficiary. The RFE specified quarterly wage reports for the last four quarters to the California Employment Development Department (Form DE-6) with each employee's wages and weeks worked.

In response to the RFE, the petitioner submitted only the 2003 Form W-2 for wages paid to the beneficiary in the sum of \$18,611, equal to, or greater than the proffered wage. The record of proceeding contains no explanation of the omission of the 2002 Form W-2, though the RFE specifically requested it. No evidence supported the petitioner's payment of wages to the beneficiary before 2003 or at the priority date, though Form ETA 750 in Part B, item 15 indicated the beneficiary's employment since 1995. Forms DE-6 from the second quarter (2Q) of 2003 to Q1 of 2004 showed that the petitioner paid the beneficiary \$18,571 during that annual period, a sum equal to, or greater than the proffered wage.

In response to the RFE, the petitioner also offered the 2001 and 2002 Form 1120, U.S. Corporation Income Tax Returns. For convenience, data from the 2003 Form 1120 is included, though the petitioner submitted it with the

appeal. These returns reported taxable income or (loss) before net operating loss deductions and special deductions (net income (loss)) and data for net current assets on Schedule L, as follows:

	2001	2002	2003
Net income (loss)	\$ 62,357	\$(20,786)	\$33,668
Current assets	\$142,174	\$ 16,000	\$No data
Current liabilities	\$0	\$0	\$No data
Net current assets ¹	\$142,174	\$ 16,000	\$No data

The director weighed, as to 2002, the omission of the 2002 Form W-2, and the net (loss) of \$(20,786), less than the proffered wage. The AAO notes that net current assets of \$16,000, also, were less than the proffered wage. The director concluded that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

The petitioner appeals, submits the 2003 Form 1120, as noted, and reasons that:

Due to a slowed economy in 2002, my income tax returns reflected an amount of taxable income of -20,786. . . . Averaging the [three] years the income would be \$25,079, which also is MORE than enough to pay the pro-offered wage.

In determining the ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, may not average selected years any more than it may select portions of a year or of various years to reach either a favorable or adverse conclusion. Moreover, as the AAO will note, below, the petitioner's assumption that a slowed economy caused its problems in 2002 does not adequately explain its conclusion as to the ability to pay the proffered wage.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

The petitioner's appeal does not cite *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), but implicitly invokes it. Within the authority of that case, CIS will consider the overall magnitude of the entity's business activities in order to clarify if ordinary financial statements misconstrue the marginal or borderline ability to

¹ Net current assets equal the difference of the taxpayer's current assets minus current liabilities. Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. See *Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). Current assets and current liabilities appear, respectively, on designated lines of Schedule L of the tax return, such as Form 1120, 1120S, or 1065. If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the given period.

pay the proffered wage. For example, from 2001 to 2003, gross income fluctuated minimally from \$644,274 to \$623,200 to \$632,699, a range of \$21,074, or under three and three-tenths per cent (3.3%).

Of course, CIS will not consider gross receipts, under *Sonegawa*, without regard to the expenses incurred to produce them. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

The petitioner contributed no helpful analysis of the federal tax returns, but the AAO independently evaluated them. From 2001-2003, the Forms 1120 showed very small, incremental fluctuations in items of income and expense, except for one expense. Between 2001 and 2002, taxes and licenses, on line 17 of Form 1120, rose from \$16,625 to \$68,999, an increase of \$52,374, or four hundred fifteen per cent (415%). Further inspection reveals that, indeed, the petitioning corporation absorbed this increase and, in the next year, 2003, produced net income, \$33,668, equal to, or greater than, the proffered wage.

The petitioner had been in business for 12 years at the time the Form ETA 750 was filed. The petitioner had steady gross receipts. The federal tax returns and Forms DE-6 showed that it employed 17-21 employees and paid out a constant amount of wages and salaries. Finally, the I-140 indicated that the proffered position was not a new position, thereby implying that the beneficiary would be replacing a previously hired employee. The record justifies the application of *Matter of Sonegawa*.

Although the director did not inquire into this question in the RFE, the validity of the job offer would be further strengthened if the beneficiary had been replacing and assuming the salary of an employee who had left the organization. The record suggests that the petitioner hires numbers of employees in a range from 17-21, but is devoid of evidence regarding the identity and actual salary of the employee whom the beneficiary might replace. Hence, the proceedings do not support a conclusion on the replacement factor. Regardless, a review of the record confirms that the job offer is realistic and can be satisfied by the petitioner. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

After a review of the federal tax returns, Forms DE-6, and Forms W-2, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The petition is approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained.